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IN THE

Supreme Court of the United States

No. 74-1068

UNITED STATES OF AMERICA ex rel.
JOHN B. ADAMS

Respondent.

VS.

PETER BENSINGER, et al.

Petitioners,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT

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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
TABLE OF CASES	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	9
A. In its handling of the issue the Court of Appeals nullified the deliberate by-pass doctrine formulated by this Court.	9
1. In *Henry* v. *Mississippi*, this Court established the deliberate by-pass doctrine in state prisoners Habeas Corpus petitions	9
2. The respondent deliberately by-passed the issue of voluntariness of his confession in the Illinois State Courts	9
B. By its holding below the Court of Appeals for the Seventh Circuit created a conflict between itself and the Court of Appeals for the Second Circuit	11
CONCLUSION	14

IN THE

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No. ———

UNITED STATES OF AMERICA ex rel.
JOHN B. ADAMS

Respondent.

vs.

PETER BENSINGER, et al.

Petitioner,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals, Seventh Circuit is reported at 507 Fed 2d 390 (1974) and is attached hereto as Appendix A.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit, adverse to the People of the State of Illinois, was issued on December 10, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether the respondent deliberately by-passed the issue of the voluntariness of his confession in the Illinois State Courts.

2. Whether the holding of the Court of Appeals for the Seventh Circuit below conflicts with the holding of the Court of Appeals for the Second Circuit.

TABLE OF AUTHORITIES

CASES:

Herry v. *Mississippi*, 379 U.S. 443, 85 S. Ct. 564 (1965);

U.S. ex rel. Schadel v. *Follette*, 447 F. 2d 297 (2nd Cir. 1971);

US. ex rel. Hall v. *Keegan*, 298 F. Supp. 975 (S.D. N.Y. 1969).

REASONS FOR GRANTING THE WRIT

A. In its handling of the issue the Court of Appeals nullified the deliberate by-pass doctrine formulated by this Court.

B. By its holding below, the Court of Appeals created a conflict between itself and the Second Circuit Court of Appeals.

STATEMENT OF THE CASE

The respondent was convicted along with two co-defendants on the murder of John Fatigato, a shoe store operator, on December 22, 1962. The operator of an adjoining store, Jerry Johnson, testified that on December 22, 1962, while defendant Adams and his two co-defendants, Henderson and Mitchell, were present in his store, he heard them engage in conversation concerning how they were going to obtain money from the shoe store operator. Respondent Adams, as well as his co-defendants each made a statement admitting his part in the crime. They also joined in a statement which encompassed the individual statements. The statements established that Henderson and Mitchell initially entered the store and inquired about a pair of shoes. Henderson grabbed Fatigato. Mitchell then locked the front door of the store and both men carried Fatigato to the rear of the store and threw him on a bed. Henderson struck Fatigato on the head with his fist twice and then tied his mouth with a gag. Mitchell went next door and returned with the respondent John Adams. The respondent helped hold Fatigato down as Mitchell tied his hands and legs with telephone wire from the store phone. The men then ransacked Fatigato's living quarters and the store taking money and other items before exiting. Eugene Tapia, Cook County Coroner's pathologist who had examined Fatigato's body, testified that in his judgment the cause of death was trauma to the head, associated with asphyxia.

Prior to trial in the Circuit Court of Cook County, Indictment No. 63-170, respondent moved to suppress his confession to the crime, alleging that the confession was

inadmissible on three separate grounds: 1) alleged illegal detention; 2) deprivation of counsel; and 3) alleged promises of immunity. (TR. 2-6, 279). After a full and complete hearing on the motion, affording respondent a full and complete opportunity to evidence his claims, the trial judge denied the motion on all three grounds. After a trial by jury, the Honorable George Fiedler sentenced petitioner to a term of not less than thirty-five nor more than seventy years in the Illinois State Penitentiary.

On direct appeal to the Illinois Supreme Court, respondent argued that the failure to give *Miranda* warnings rendered respondent's confession involuntary. The Illinois Supreme Court affirmed respondent's conviction holding that *Miranda* and *Escobedo* were inapplicable.

Respondent then sought relief by way of habeas corpus in the United States District Court, again alleging involuntariness of his confession. Respondent relied solely upon the state court record, but as opposed to the grounds asserted in both the trial court and the Illinois Supreme Court, petitioner contended in the District Court (for the first time) that the "totality of the circumstances" surrounding his confession established involuntariness. The District Court dismissed respondent's petition for failure to exhaust state remedies. On appeal of the dismissal, the Seventh Circuit Court of Appeals remanded to the District Court for a determination as to whether or not the "totality" grounds had been presented to and decided on the merits by the Illinois Supreme Court (No. 16796, Sept. 1968). The District Court found that *these* grounds had not been considered and ruled upon by the Illinois Supreme Court, and dismissed the petition suggesting that respondent pursue available state post conviction remedies. Respondent then petitioned the Circuit Court of Cook

County for relief under the Illinois Post Conviction Hearing Act, alleging that the "totality" established involuntariness of his confession. After an evidentiary hearing Honorable George Fiedler dismissed the petition holding that the issue of the voluntariness of respondent's confession had already been denied by the Illinois Supreme Court on direct appeal, and that respondent was barred from now asserting *new* grounds that could have been asserted on direct appeal. On appeal of this dismissal the Illinois Supreme Court affirmed the dismissal. (*People* v. *Adams*, 52 Ill. 2d 224 (1972) holding:

> "On this appeal the petitioner now argues that the involuntariness of his confession is established by the totality of the circumstances surrounding the giving of the statements. That argument is predicated upon the evidence presented in the hearing on the post-conviction petition in the form of testimony of a behavioral scientist and that of a clinical psychologist who examined the petitioner in 1964 when he was admitted to the State penitentiary. They testified that petitioner had an I.Q. of 56 to 62, was illiterate and in their opinion possessed limited mental capacity. Significantly, however, at the original pretrial motion to suppress his confession and at trial it was repeatedly noted that petitioner could not read or write and had only a second grade education. No suggestion is made that evidence similar to that presented at the post-conviction hearing was not available at trial.
>
> This post-conviction proceeding, in essence, seeks to relitigate the same issue on the basis of evidence, all or much of which could have been presented at the trial and which does not necessarily require a different result . . . It is our opinion that the application of the doctrine of *res judicata* should not be relaxed . . ."

Respondent then petitioned the District Court for habeas relief, alleging, on the basis of the trial record and evidence produced at the post conviction hearing, that the totality of circumstances surrounding his confession established involuntariness. The Honorable Richard B. Austin, District Court Judge, dismissed the petition, holding in a memorandum opinion that:

> ". . . throughout the trial, Adams denied ever making the confession that was admitted into evidence against him. Since he was represented by counsel, it was reasonable to assume that as a matter of trial strategy the defense preferred to rely on this denial rather than attempt to convince the trial and appellate courts that the confession was involuntary. Furthermore, a hearing was held prior to trial on a motion to suppress the confession, but the question of involuntariness was by-passed even though it appears that evidence to support that claim was then available. Hence, the issue of voluntariness is not properly before this court on a petition for habeas corpus."

Judge Austin went on to hold that:

> ". . . even if the issue of voluntariness was now properly before this court, I am of the opinion that Adams possesses the requisite mental capacity to make a voluntary confession, despite the opinion of a behavioral scientist and clinical psychologist, neither of whom are medical doctors . . . [F]or a person who is now supposedly mentally defective, his answers to questions were always responsive and lucid . . . [E]ven when he was subjected to a grueling cross-examination by the prosecution at the time he denied ever making the confession at all."

The respondent then appealed from the judgment of the District Court, to the U.S. Court of Appeals for the

Seventh Circuit. And on December 10, 1974, that Court unanimously reversed the District Court and ordered that the "writ (of habeas corpus) issue unless the petitioner is given a new trial within 120 days of the date of the mandate of this Court." On January 22, 1975 the Seventh Circuit ordered that their mandate be stayed on the condition that the respondents-appellees petition the U.S. Supreme Court for a Writ of Certiorari on or before Feb. 21, 1975.

REASONS FOR GRANTING THE WRIT

A.

IN ITS HANDLING OF THE ISSUE THE COURT OF APPEALS NULLIFIED THE "DELIBERATE BY-PASS" DOCTRINE FORMULATED BY THIS COURT.

1.

In Henry v. Mississippi, 379 U.S. 443, 85 S. Ct. 564 (1965), This Court Established The Deliberate By-Pass Doctrine In State Prisoner's Habeas Corpus Petitions.

In *Henry*, this Court held that a ". . . deliberate choice of . . . strategy would amount to a waiver binding on petioner and would preclude him from a decision on the merits of his federal case either in the state courts or here" This case presents just such a deliberate strategy by the respondent.

2.

The Respondent Deliberately By-Passed The Involuntariness Of His Confession As An Issue In The Illinois State Courts.

The all important fact in this appeal is that at *no point* during either the pre-trial motion to suppress or the trial itself, did the respondent even *remotely* suggest the voluntariness of his confession as an issue before the trial court. The trial record is absolutely and unequivocally clear on this point. (See Appendix C; A. 14, 15, 16, 17, 111, 112, 113, 114)

At the pretrial suppression hearing the respondent merely recounted his arrest and questions in a straightforward, chronological manner (A. 14, 15, 16, 17). But

further, and most importantly he laid the ground work for what, at trial, would become an alibi defense (A. 15). The thrust of all respondent's pretrial testimony was threefold; (1) alleged illegal detention; (2) deprivation of proper control; (3) alleged promises of immunity. At no time did the respondent even vaguely hint that his confession was involuntary.

When confronted with his confession at trial, the respondent categorically denied each and every material statement contained therein, even going so far as to deny the presence of a court reporter (A. 111, 112). The respondent further gave an accounting of his whereabouts on the night of the offense, which placed him away from the scene of the crime and thereby raised an alibi defense. Through his various appellate maneuvers the respondent has acted to transform what at trial were questions of fact for the jury's determination, into questions of law. Thus in reaching its verdict, the jury weighed matters of credibility which included the respondent's denial of his confession. On appeal, however, the respondent has sought to raise the circumstances of his confession as a matter of law.

Respondent's testimony during the pretrial supplementary hearing and actual trial was consistent with a deliberate strategy to by-pass the issue of voluntariness.

The record is clear that the respondent did not raise the voluntariness issue during the pretrial hearing, although that did not legally preclude the issue from being raised at trial. Simple logic however dictates that a credible defendant could not have simultaneously maintained that, (1) he never made a confession *and* (2) that even if he did, the confession was involuntary. Therefore, ra-

ther than relying on such an obvious contradiction the respondent deliberately chose another avenue of defense, the alibi. The deliberateness of rspondent's strategy is manifested by his steadfast denials of ever making a confession even, as Judge Austin pointed out in the District Court, under "grueling cross examination" (App. B.)

Thus, for the Court below to hold that "there was no tactical reason to avoid raising the contention of voluntariness in the state courts," is to defy common sense.

For the above stated reasons, the petitioner submits that the Court below incorrectly decided the threshold by-pass issue and therefore improperly proceeded to a determination of the ultimate issue of voluntariness.

B.

By Its Holding Below The Court Of Appeals Created A Conflict Between Itself And The Second Circuit Court Of Appeals.

In *United States ex rel. Cruz* v. *LaVallee*, 448 F. 2d 671 (2nd Cir., 1971), wherein petitioner, *as here*, failed to object to the voluntariness of his confession at the trial court and failed to request a charge to the jury on voluntariness, the Second Circuit Court of Appeals after reviewing the record in the case, found that the record reflected a deliberate and consistent trial strategy of the defense not to question the voluntariness of petitioner's confession. The court denied the petitioner even an evidentiary hearing, holding that petitioner's deliberate bypass waived any right to have his new claim heard in federal court. Significantly, in *Cruz*, as in the present case, the trial strategy was such that attacking the voluntariness of the confession would have presented inconsistencies that would have confused the jury and would

have "directed the jury's attention away from the factors which [petitioner] and his counsel clearly hoped would influence the jury to reject a murder conviction". (at 673) Furthermore, the *Cruz* court rejected petitioner's contention that his defense counsel's strategy could not be considered a waiver on his part since petitioner *himself* did not participate in that decision, stating the following:

> We reject this contention. The Supreme Court stated in Henry v. Mississippi that "the deliberate bypassing by counsel of the contemporaneous-objection rule as a part of trial strategy would have [the] effect" of precluding the defendant from later asserting constitutional claims, even where the trial strategy was adopted by counsel without prior consultation with the defendant. 379 U.S. at 451-452, 85 S. Ct. at 569. A lawyer must be able to determine questions of strategy during trial; and unless there are exceptional circumstances or unless the lawyer is so incompetent as to deprive the defendant of the right of effective assistance of counsel, his decision regarding trial strategy must be binding. See. *United States ex rel Schaedel* v. *Follette*, 947 F. 2d 1297 at p. 1300 (2nd Cir. 1971); *United States ex rel. Bruno* v. *Herold, supra*, 408 F. 2d at 128-129; *United States ex rel. Aaron* v. *Herold*, 426 F. 2d 125, 127 (2nd Cir. 1970); *Kuhl* v. *United States*, 370 F. 2d 20, 26-28 (9th Cir. 1966) (en banc.). There are no exceptional circumstances here. Cruz makes no claim of incompetence of counsel nor would such a claim be justified since the record of the trial indicates, and the district court found, that Cruz's distinguished trial counsel adopted a reasonable, well-thought-out, and well-presented strategy in light of the overwhelming evidence against the defendant.

In *United States ex rel. Schaedel* v. *Follette*, 447 F. 2d 297 (2nd Cir. 1971), petitioner *as here* had failed to object to an allegedly involuntary admission at the trial court, had not attempted to raise the issue on direct appeal, and had been held to have waived the objection in subsequent coram nobis proceedings. The Second Circuit Court of Appeals affirmed the dismissal of petitioner's habeas corpus petition, emphasizing the fact that petitioner not only failed to object at trial but failed to raise the issue on direct appeal as well. The court rejected petitioner's contention that he was not bound by his counsel's strategic choice:

> A strategic decision by appellant's counsel not to object to a confession, with or without prior consultation with the client, is binding on the client in the absence of exceptional circumstances. *Henry* v. *Mississippi*, *supra*; *United States ex rel. Aaron* v. *Herold*, 426 F. 2d 125 (2nd Cir. 1970). Counsel's position as manager of the lawsuit requires such a standard, and a contrary rule would unnecessarily disrupt the trial process. See J. Gibons, Waiver: The Quest for Functional Limitations on Habeas Corpus Jurisdiction, 2 Seton Hall L. Rev. 291, 304-305 (1971); Developments—Federal Habeas Corpus, 83, Harv. L. Rev. 1038, 1109-1112 (1970) . . . Absent a claim of incompetence of counsel, therefore, counsel's deliberate decisions not to object or raise the issue on appeal foreclosed federal habeas relief. *Cf. McMann* v. *Richardson*, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970); *J. Gibbons*, *supra* at 305.

See also *United States ex rel. Hall* v. *Deegan*, 298 F. Supp. 975 (S.D. N.Y. 1969).

Therefore, it is clear, that the Seventh Circuit's holding in this case, is in direct conflict with cases cited above.

CONCLUSION

For the foregoing reasons the petitioner requests that a petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No 73-1531

UNITED STATES OF AMERICA, ex rel.
JOHN B. ADAMS,

Petitioner-Appellant,

v.

PETER BENSINGER, DIRECTOR,
Department of Corrections, and
John Twomey, Warden,

Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division —

No. 72 C 2794

Richard B. Austin, *Judge.*

Argued April 11, 1974 — Decided December 10, 1974

Before SWYGERT, *Chief Judge,* FAIRCHILD and SPRECHER, *Circuit Judges.*

SWYBERT, *Chief Judge.* This appeal represents what we hope will be the last major step in a seven year legal battle to have the federal courts consider the merits of petitioner John B. Adams' claim for habeas corpus relief.

In 1963 petitioner, with two co-defendants, was convicted of murder in an Illinois court and sentenced to a prison term of thirty-five to seventy years. On direct appeal to the Illinois Supreme Court his conviction was affirmed. *People* v. *Henderson,* 37 Ill. 2d 489, 229 N.E. 2d 519 (1967). Petitioner then filed a habeas corpus petition in the United States District Court for the Northern District of Illinois, alleging that an involuntary confession had been used against him. On January 11, 1968 this petition was dismissed for failure to exhaust state remedies. On appeal to this court the order of dismissal was vacated and the cause was remanded to the district court for review of all documents before the Illinois Supreme Court to determine whether the voluntariness issue had been squarely presented to and considered by that court. *Adams* v. *Pate,* 418 F. 2d 815 (7th Cir. 1969). On remand, the district court again dismissed for failure to exhaust state remedies. That order was affirmed by this court with the suggestion that petitioner had state remedies available under the Illinois Post-Conviction Hearing Act.[1] Pursuant to this suggestion, a petition for state post-

1. For this court's present view of when relief must be sought under the Illinois Post-Conviction Hearing Act before a federal habeas corpus petition will be entertained see *United States ex rel. Williams* v. *Brantley,* 503 F. 2d 1383 (7th Cir. 1974).

conviction relief was filed before the original trial judge in 1970. An evidentiary hearing was held on the issue of the involuntariness of the confession, but on March 19, 1971 the trial judge, without making a finding on the ultimate question of the voluntariness of the confession, denied petitioner any relief apparently on the basis of res judicata and waiver. On September 20, 1972 the Illinois Supreme Court affirmed on the ground that "inasmuch as the issue of the voluntariness of his confession was decided adversely to petitioner on direct appeal, reconsideration of the issue was barred by *res judicata.*" *People* v. *Adams*, 52 Ill. 2d 224, 225, 287 N.E. 2d 695 (1972).

Petitioner then filed the federal habeas corpus petition that is the subject of this appeal. Again the issue raised was the use of a confession that was allegedly involuntary in view of the totality of the circumstances. The district court dismissed the petition without a hearing on the basis that the petitioner had waived this claim by not raising it in the state courts. The court added that even if the issue were before it, the confession would be deemed voluntary.

I

Our initial question is whether for purposes of federal habeas corpus relief the petitioner has waived the claim of an involuntary confession by failing to raise the contention in terms of the "totality of the circumstances." We do not think that there has been such a waiver.

The test to be applied is whether there was a deliberate tactical decision to forego this claim. *Fay* v. *Noia*, 372 U.S. 391 (1963). It appears to us that the issue was at least implicity brought before the state courts and that

there is no basis for concluding that the failure to pursue the matter more forcefully in the state courts was an attempt to derive a tactical advantage. Prior to trial a motion to suppress the confession was made and considered. The state courts both at the trial and appellate level were put on notice that the admissibility of this confession was being challenged on due process grounds. Moreover, this objection was made at the earliest desirable point.[2] Admittedly, the arguments concerning the inadmissibility of the confession were directed mainly at the failure to give the type of warnings later required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966) and *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). Still, as respondents point out, almost all the evidence upon which petitioner now relies was introduced at the original suppression hearing. These factual elements were put before the judge in the context of an attack upon the admissibility of the confession and the court had the opportunity to determine that the confession was involuntary in view of all the circumstances. Nor is it certain that this issue was not presented on direct appeal, even though the briefs were directed at the *Miranda* question. The Illinois Supreme Court apparently believed that it had considered the issue, since it later ruled that the post-conviction petition was barred by res judicata rather than by the doctrine of waiver which also bars relief under the Illinois Post-Conviction Hearing Act. See *United States ex rel. Williams* v. *Brantley*, 503 F. 2d 1383 (7th Cir. 1974).

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2. See *Henry* v. *Mississippi*, 379 U.S. 443 (1965).

This is not simply a case in which there was a failure to raise a certain argument or object to particular evidence in order to further an intended strategic maneuver. The filing of the motion to suppress is conclusive proof that there was no desire to allow the introduction of the confession. We do not find persuasive the fact that at trial Adams denied ever making the confession. The question before us is a legal one concerning the constitutionality of the confession. That question could have been presented to a court without infringing on the ability to deny the fact that the confession was ever given. Indeed, despite this denial a constitutional attack on the confession was entertained on direct appeal.

We are presented with an important claim that does "call into question the accuracy of the fact-finding process."[3] There was no tactical reason to avoid raising the contention in the state courts. Notice of objection to the confession was given at the appropriate time. The highest court in Illinois has indicated that the issue was in fact considered. There has been no deliberate by-pass of state remedies and petitioner is entitled to have a federal court finally consider the merits of this alleged constitutional deprivation.

II

We have determined that the ultimate question of the voluntariness of this confession is also before us. The district court did address the merits. An evidentiary hearing is unnecessary since there was one in state court on the post-conviction petition and the adequacy of that hear-

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3. *United States ex rel. Allum* v. *Twomey*, 484 F. 2d 740, 746 (7th Cir. 1973).

ing is not being challenged. Further, the habeas corpus petition itself requests relief on the basis of the state record alone. Petitioner's counsel has conceded that there is no additional evidence to be submitted. Accordingly, we have requested and received supplemental briefs discussing this question.

The facts relevant to this inquiry are as follows. The police, without a warrant, took the petitioner from his bed at about 1:00 a.m. on December 28, 1962 and placed him under arrest. He was then taken to a police station where, for at least some period of time, he was locked to a radiator. Several police officers questioned petitioner for the admitted purpose of getting a confession, if possible. However, petitioner was never informed of his right to remain silent or his right to have a lawyer present. At approximately 2:30 a.m. an assistant state's attorney arrived at the police station with a court reporter. The assistant state's attorney questioned Adams and his two co-defendants who had also been arrested. He then proceeded to take recorded statements from each of them in the form of questions and answers. Petitioner's statement was the last to be taken and commenced at 5:10 a.m. A joint statement was also given beginning at 6:05 a.m. The assistant state's attorney had not informed petitioner of his right to remain silent and his right to the assistance of counsel, although petitioner had stated he could neither read nor write English and had only a third grade education.

At about 7:00 a.m. petitioner was transferred to the police department central detention facility. At about 1:00 p.m. he was transferred to the Criminal Courts Building and taken to the library where, at about 2:30

p.m., in the presence of a police officer and an assistant state's attorney, he initialed and signed the confession after it was read aloud to him. Petitioner was finally taken before a judge on December 29, 1962.

It was later established that the petitioner had no prior police record. At the post-conviction petition hearing considerable evidence concerning the petitioner's mental capacity was introduced.[4] Petitioner's intelligence quotient was found to be in the range of 56 to 62, indicating a person who is "mentally defective." A trained behavioral scientist explained that one who is "mentally defective" would have defective comprehension of oral or written directions or communications, especially when under tension or in strained surroundings. Adams' ability to depend on his memory was also impaired. A clinical psychologist described petitioner as a "very naive, simple man, who could very well, very easily be influenced, who is quite unsophisticated and not aware of relationships in the world." He further testified that petitioner was "very cooperative but very docile."

The test to be applied in cases such as this in which *Miranda* is not applicable is based on those "standards of voluntariness which had begun to evolve long prior to our decisions in *Miranda* and *Escobedo* . . ." *Davis* v. *North Carolina*, 384 U.S. 737, 740 (1966). The Supreme Court has recently summarized these standards in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973):

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4. While this evidence was based on tests and examinations given petitioner when he entered prison in 1964, we see no reason to question that the conclusions adequately portray petitioner's mental capacity when he gave the alleged involuntary confession.

> In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, *e.g., Haley* v. *Ohio,* 332 U.S. 596; his lack of education, *e.g., Payne* v. *Arkansas,* 356 U.S. 560; or his low intelligence, *e.g., Fikes* v. *Alabama,* 352 U.S. 191; the lack of any advice to the accused of his constitutional rights, *e.g., Davis* v. *North Carolina,* 384 U.S. 737; the length of detention, *e.g., Chambers* v. *Florida, supra;* the repeated and prolonged nature of the questioning, *e.g., Ashcraft* v. *Tennessee,* 322 U.S. 143; and the use of physical punishment such as the deprivation of food or sleep, *e.g., Reck* v. *Pate,* 367 US.. 433. In all these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal signifiance of how the accused reacted. *Culombe* v. *Connecticut, supra,* at 603. (footnote omitted)

Thus, we must look to the merits of each individual factor, but ultimately the decision as to voluntariness should be based on an evaluation of the totality of all the circumstances.

We believe there are three elements which call into question the voluntary nature of this confession. The first is the undisputed fact that petitioner was never informed that he had a right to remain silent and a right to the assistance of counsel. The assistant state's attorney failed to inform him of these rights although he was aware of how little education the petitioner had and how unlikely it was that he knew of these rights. This failure to inform petitioner of these rights is an important element

in our equation regardless of the inapplicability of *Miranda*, since the fact "that a defendant was not advised of his right to remain silent or his right respecting counsel at the outset of interrogation, as is now required by *Miranda*, is a significant factor in considering the voluntariness of statements later made." *Davis v. North Carolina*, 384 U.S. 737, 740 (1966). The weight to be accorded this fact is particularly great in light of petitioner's lack of previous contact with the police.

The second factor concerns the timing of the interrogation. Petitioner was apparently awakened by the police. The questioning occurred during the middle of the night and petitioner most certainly suffered from lack of sleep. The clear purpose of this questioning was to get a confession if at all possible. The voluntary character of this desired confession is lessened by the hour of the day during which it was given.

The final and most substantial consideration involves the nature of petitioner himself. A significant doubt is cast over the confession of a man of such low intellect and limited education. While petitioner was capable of giving a voluntary confession, the expert testimony of his inability to understand communications and his docile nature necessitate a skepticism concerning the voluntariness of his confession.

The district judge, however, greatly discounted this psychological testimony because his reading of petitioner's testimony at trial and at various hearings indicated that Adams' answers were "always responsive and lucid," even under cross-examination. We agree that it is proper to consider such testimony and our own reading

of petitioner's answers has convinced us that there is some merit to this conclusion. But what the court below has failed to take into account is the fact that at the time of this testimony petitioner was represented by counsel who undoubtedly prepared him. The clinical psychologist testified that Adams' apparent recognition in court of the function of a warrant was not conclusive, since he could have been prompted to give an answer without real understanding. The undisputed results of objective intelligence tests are of overriding significance. Our concern is with petitioner's abilities during a period in which he had not received the assistance of counsel and had no one to advise him. We believe the expert psychologist testimony is helpful in this regard.

Indeed, the facts of this case are strikingly similar in this aspect to those in *United States* v. *Hull*, 441 F. 2d 308 (7th Cir. 1971), where we relied heavily on the defendant's limited mental capabilities in determining that his confession was involuntary. *Hull* was described as follows:

> J. L. Hull is a 34 year old Negro who is mentally defective. His full-scale I.Q. is 54, and he has the mental age of an eight or nine year old child. He completed the third grade in school and is illiterate. Psychiatric experts termed him passive and easily led by a more dominant personality. Hull can follow instructions if they are repeated or paraphrased for him several times; otherwise he has a tendency to lose his attention and comprehension.[5]

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5. 441 F. 2d at 309.

Based on that description we found that *Hull* "was ill-equipped to combat 'the diverse pressures which sap or sustain his powers of resistance and self-control'."[6] The same must also have been true of Adams.

Viewing all these factors together has led us to conclude that petitioner's confession was involuntary. Respondents address each consideration separately and argue that each is not necessarily sufficient in and of itself to support this conclusion. Our task is to consider the combination of all these elements. Even if we were to accept the proposition that no one factor is conclusive, we still must look to the totality. What we find is a confession given in the middle of the night by a tired, inexperienced, uneducated, docile, mentally defective man who was never even informed that he did not have to talk and that he was entitled to the aid of an attorney. Such a confession is not "the product of a rational intellect and a free will." *Blackburn* v. *Alabama*, 361 U.S. 199, 208 (1960).

The judgment of the district court is reversed and this cause is remanded to the district court with direction that the writ issue unless the petitioner is given a new trial within 120 days of the date of the mandate of this court.

A true Copy:

Testes

Clerk of the United States Court of Appeals for the Seventh Circuit

. . . . . .

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6. 441 F. 2d at 312.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, ex rel JOHN B. ADAMS,

Petitioner

vs.

PETER BENSINGER, JOHN J. TWOMEY,

Respondents.

No. 72 C 2794

MEMORANDUM OPINION and JUDGMENT ORDER

The allegations contained in this habeas corpus petition have been adequately answered by respondents' brief in support of their motion to dismiss. I can only add the following comments.

First, throughout the trial Adams denied ever making the confession that was admitted into evidence against him. Since he was represented by counsel, it is reasonable to assume that as a matter of trial strategy the defense preferred to rely on this denial rather than attempt to convince the trial and appellate courts that the confession was involuntary. Furthermore, a hearing was held prior to trial on a motion to suppress the confession, but the question of voluntariness was bypassed even though it appears that evidence to support that claim was then available. Hence, the issue of voluntariness is not properly before this court on a petition for habeas corpus, *Fay* v.

Noia, 372 U.S. 391, 438-39 (1963), and petitioner's reliance on *United States* v. *Hull,* 441 F. 2d 308 (7th Cir. 1971) is misplaced. It must be remembered that *Hull* was a case in which the defense properly raised the issue of voluntariness before the trial court, whereas here it appears that counsel deliberately bypassed that defense in favor of others.

Second, even if the issue of voluntariness was now properly before this court, I am of the opinion that Adams possesses the requisite mental capacity to make a voluntary confession, despite the opinions of a behavioral scientist and a clinical psychologist, neither of whom are medical doctors. I have closely read all of Adams' testimony both at his trial and at various hearing and was impressed with the fact that, for a person who is now supposedly mentally defective, his answers to questions were always responsive and lucid. Indeed, these qualities characterized Adams' testimony even when he was subjected to a grueling cross examination by the prosecution at the time he denied ever making the confession at all. Anticipating that testimony of Adams' mental condition, similar to that which I have already read, would be offered at an evidentiary hearing, I find this insufficient to overturn his conviction either on its own weight or when viewed as but a part of the totality of circumstances that allegedly rendered these confessions involuntary. The abuses complained of here simply do not rise to the level of those condemned in *United States* v. *Hull, supra.*

R. B. AUSTIN,
Judge, United States
District Court.

DATED: FEBRUARY 23, 1973.

APPENDIX C

EXCERPTS FROM ABSTRACT OF ORIGINAL STATE TRIAL RECORD FILED IN RESPONDEN'S DIRECT APPEAL

89 JOHNNY ADAMS, Defense Witness—(At pre-trial Motion to Suppress)

Direct Examination by Miss Knipper.

My name is Johnny Adams. Prior to my arrest I was living at 3031 West Polk Street. I am 29 years old. I went to school in Mississippi. I went to second grade. I cannot read and write.

I was arrested on a Thursday night at about 12:30,
90 by about three or four people. I was in bed in my own home. These people didn't show me any warrant for my arrest. They took me to the police station. I don't know where it is located. I don't have the least idea what time I arrived at the police station.

When I got to the police station, they taken me in a little room. No one was in there. They asked me what
91 happened. I said, "I don't know anything that happened." There was just one other person in the room with me at that time. He locked me to a radiator. Then two or three more fellows came in. set me down and start asking me questions. They were dressed in regular suits. I told them I don't know nothing about
92 who killed the old man; that I had been upon Kedzie; that I knew where the clothing store was; that I had been in there; that I knowed the guy that owned the place and I had known him every since '56, and I

worked in there and helped the guy to run the place; that Jerry Johnson came in the place that Saturday; that Jerry Johnson and I walked to the liquor store and got a drink of whiskey, walked right through the alley and drank it, and came back to the clothing
93 store; that Jerry Johnson had gone home to wait on the mailman; that about twenty minutes later, my wife came up there and we were sitting there and shortly after then, Jerry Johnson came back. So we sat there awhile. Jerry Johnson, Yarborough and Billie Adams and we all went to Jerry Johnson's cousin's home across the street on Kedzie.

Then they put us all in a room together. We were in that room about three hours. They did not take us before any judge. Then they taken us all in one room together. When I walked in, James Henderson, Leroy
94 Mitchell and some more peoples was in that room. No one at that time told me I had a right to a lawyer. No one told me I had a constitutional right not to say anything.

They pulled out some pictures and asked us had we ever seen this man before. I told him "Yes" because I used to work next door there. I can't recall approximately how long it was we were in this room, but after
95 that they taken us to the other police station when it was just about daylight. In that police station they taken us around to the bull pen. We weren't brought before any judge at that time. We stayed in there a couple of hours. We were not questioned there. That is when James Henderson went to the doctor. Then they brought him back and we sit there for about another couple of hours.

96 Then they taken us out of that police station and brought us over to this building. They put us on an
97 elevator and put us in a room. There was two guys sitting in there. One said. "You guys mustn't want to go home," he is looking at his watch, and he say, "I'm waiting for you for two hours." So we all sat down. So he reached and got some papers and said, "Sign here." I said, "I can't write." "Can you write your initials, J. B. A.?" and I said, "Yes." He said, "Put that on there." He handed me the papers and I put J. B. A. on them nad passed them back to him. Then they taken us back to the police station. Up until this point I had not been taken before any judge.
98 When they showed us these papers, they said, "You guys must don't want to go home."

Those look like my initials on the papers. That is
99 my signature on the 9th page. That is on page 15 of the second bunch of papers that they told me to sign.

Cross Examination by Mr. Gill.

I know Jerry Johnson. I saw him that Saturday on Kedzie next to the shoemaker in the clothing store. He was around there drinking. Mitchell and Henderson were not with me. Alonzo Yarborough was with Jerry Johnson.

101 I was arrested about 12:30. They started to question me as soon as I got to the police station. While I was being questioned, there was no man present with a a stenographic machine. After that I was brought to some other station. Sometime that day I was brought to a building to sign some papers.

That is my signature on People's Exhibit No. 4. Those are my initials on pages one through eight, and my signature on page nine. I told the man I couldn't read or write. He did not read the statement back to me.

106 Then I was brought back to the station that I had just come from. The next morning I went before a judge.

722 JOHN ADAMS, Defense witness in his own behalf: (At trial)

Direct Examination by Miss Knipper.

My name is John Adams. Prior to being incarcerated in the Cook County Jail, I lived at 3031 West Polk Street. I am 29 years old. I was born in Mound Bayou, Mississippi. I have lived in Chicago about
723 10½ years. I went to the second grade in school down in Mississippi. I can't read and write.

I was arrested on Thursday night after Christmas. That would be December 28th, 1962, about 12:30 in the morning. I was arrested at home. No one showed me a warrant for my arrest at that time. I was taken to a police station. I don't know where this station
724 was. Then they taken me in a room and questioned
725 me. I remained at this first police station until about 20 minutes to 7:00 the next morning. I can tell time. During the questioning at the first police station, I
726 did not at any time tell any of the police officers that I killed John Fatigato. Or that I went into Fatigato's store to rob him.

When I left that police station, they brought me to this building. Before this, they took me to another police station. I don't know where this police sta-

tion is. I stayed there until Friday evening. I mean in the afternoon, after 12:00. I was not questioned
727 at that police station. Then they brought me to this building with Mitchell and Henderson; we went on
728 the second floor. They put us in a little old room. There was two guys there dressed in suits.

They said, "Do you all want to go home?" I said, "Yes." They said, "Come on," and carried us in the room and put out some papers and said, "Sign here." So I told them I couldn't write; I put JOH,
729 and that was all. No one read this statement to me. After I signed the paper, they taken us back to the jail and locked us up. While I was in the little room, I did not see anyone with a machine like the one in front of me. On Saturday before Christmas, December 22, 1962, I left my home about 8:30 in the morn-
730 ing. I went up on Kedzie to a used clothing store at 756 South Kedzie. Alonzo Yarborough owned that store. I worked for Alonzo. I stayed there about 35 minutes. I saw Alonzo Yarborough there, and Betty
731 Adams. She came in about ten after 9:00. About fifteen minutes later, I went across the street to the
732 second floor, to some friends of Alonzo Yarborough's. I stayed there about fifteen minutes and left with Betty Adams and Alonzo Yarborough. Then I went home with Betty Adams. I did not leave my home during the rest of the day, but I did leave about a quarter after 10:00 that night. I went across the
733 street to the beer tavern. Then I returned home and stayed there the rest of the evening.

Cross Examination by Mr. Gill.

I left the house on December 22, about 8:30, by myself. And went to 756 South Kedzie. I stayed there about 10 or 15 minutes. I saw Alonzo Yarborough there. I did not see Jerry Johnson. I did not leave with my wife that morning. I left by myself. Betty
734 Adams is my wife. I was married in Chicago. I can't recall where it was.

I left by myself that morning. Later on, Betty came
735 over to 756 South Kedzie, a second hand clothing
736 store. I did not go to a shoe store with Betty at all that morning. After Betty came to the store, I went with Yarborough across the street. Yarborough left the store and locked it. I stayed there about ten or
737 fifteen minutes; then went home. I stayed at home all day. I left the house about 10:15 that night. I never left the house again that morning, and did not meet Mitchell and Henderson. I never told anybody that I met them; or that on the morning of December 22nd,
738 1962, we went into the shoemaker's shop; or that I opened up a Frigidaire in there; or that I took some wine out of the closet.

On December 28, 1962, I was questioned in the
739 police station. I told them my name, my birthday, how old I was, where I lived, where I was born. I don't know if somebody wrote all those things down. If they asked me how long I had been here in Chicago, I told them. I didn't tell them how tall I was. While I was being questioned, there was no man sitting in front of me with a little machine like this. I don't know Mr. Flannery. I don't know no Mr. Gerald
742 Shea. I was sitting in this courtroom yesterday and the day before.

On December 28, 1962, at the Maxwell Street Station, I did not tell the man questioning me that I got some keys out of the shoemaker's trousers; or that I took these keys and put them on a little old desk; or that I tied the man up by the legs. I never told that to Mr. Shea or said that in front of a man with a recorder machine like the man in front of me has. I never told anyone that I opened up the Frigidaire. Or that I walked in the room where the wine was; or that I did not go through the bedroom drawers; or that I went to the third grade. I went to the second grade. I told the man who was questioning me that I could not read or write. I never told anyone that I left the store and went down to the corner and got a quart of wine; or that I was with two other fellows, Jerry and Yarborough, and that they were sitting there drinking and having a little conversation; or that I was holding his hand while they were tying him up; or that I was in the kitchen; or that I went into the room next to the bedroom; or that when I left the place I went back in the clothing store.

Some people call me Jimmy, sometimes. I have been called Jimmy, but my name is John. I told the man that was questioning me that my name was Johnny Adams. After I was questioned, I was taken down to the police station, where a big clock was as I came in. It was about twenty to 7:00. Later in the day I came over to this building. I don't remember being put in a room with no Dean Bilton. I don't remember yesterday seeing a short little fellow with glasses on the stand here who said he was the State's Attorney who read back the statement to me. I have only gone to the second grade of school.

I don't remember at any time since this trial started, a man testifying here that he read the statements back to me and had me sign them. I placed the initials JBA on People's Exhibit 18. I wrote J-O-H. I don't remember this man testifying that after I put the initial JBA, I then started to write my name and got as far as J-O-H, and he told me it was not necessary. I do not remember that testtimony. I signed my initials on each page of that document. That is my printed signature on the last page. This man never read any of this statement back to me. I never told an Assistant State's Attorney down at the Maxwell Street Station the facts that are in here, that were read to the jury. I didn't tell him anything. I don't know if the man who asked me to sign this statement was the same man that was present when I was being questioned down at the Maxwell Street Station. I don't know Mr. Shea from Mr. Bilton. I wasn't paying no attention to how tall they were. I have told some people other than the Assistant State's Attorney that my name was Jimmy. I don't recall who it was that I told. They were not policemen. It was not at the station that I told them this. It could have been on my job; I don't know exactly where it was. From the time I was arrested until now, I have not told anybody that my name was Jimmy. I can't remember if Henderson or Mitchell at any time while we were being questioned referred to me as being Jimmy. I don't know if they told the man who was questioning us that my name was Jimmy.

(Witness excused)

Defense rests.